Supreme Court, U.S.
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Case No.: 981138

In The

# Supreme Court of the United States

October Term, 1998

MICHAEL A. SCOTT

*Petitioner,*

*versus*

NORFOLK SOUTHERN CORPORATION, *et al.*,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Whether the District Court erred in dismissing the plaintiff's claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981, against all defendants and in not allowing him to present evidence to support such claims?

(2) Whether the District Court erred in refusing to allow the plaintiff to claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, that his job transfer, on-the-job harassment and employment termination were due to his black race and were acts of retaliation for having previously filed a charge of discrimination with the Federal Equal Employment Opportunity Commission and subsequent lawsuit based on that charge against Norfolk Southern Corporation?

## PARTIES TO THE PROCEEDING

In addition to Norfolk Southern Corporation, individual defendants David R. Goode, Stephen C. Tobias, Donald W. Mayberry, Jon L. Manetta, William E. Honeycutt, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Timothy A. Heilig, Lewis D. Hale, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair and Jerry W. Clemmer were parties before the Court of Appeals.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented . . . . . | i |
| Parties To The Proceeding . . . . . | ii |
| Table Of Contents . . . . . | iii |
| Table Of Citations . . . . . | v |
| Opinions Below . . . . . | 1 |
| Statement Of Jurisdiction . . . . . | 1 |
| Statutory Provisions Involved . . . . . | 2 |
| Statement Of The Case . . . . . | 3 |
| A. Background Of The District Court's Dismissal Of Petitioner's § 1981 Claim . . . . . | 3 |
| B. Background Of The District Court's Refusal To Allow The Petitioner To Claim That The Harassment, Job Transfer And Discharge Were Racially Motivated And Acts Of Retaliation Under Title VII of the Civil Rights Act of 1964 . . . . . | 8 |
| Reasons For Granting The Writ . . . . . | 10 |
| I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On Construing Pleadings of Litigants | |

Proceeding Without The Aid Of Professional Counsel . . . . . 10

II. The Petition Should Be Granted Because The Opinion Below Conflicts With The Requirements Of Federal Rule Of Civil Procedure 10(c) And The Opinion Of Other Federal Courts Of Appeals . . . . . 12

Conclusion . . . . . 15

## TABLE OF CITATIONS

**Cases Cited:**

*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990) . . . . . 11

*Beacon Theatres, Inc. v. Westover*, 79 S.Ct. 948, 359 U.S. 500, 3 L.Ed.2d 988 (1958) . . . . . 12

*Beaudett v. City of Hampton*, 775 F.2d 1274 (4th Cir. 1985) . . . . . 14

*Burris v. State Department of Public Welfare of S. C.*, 491 F.2d 762 (4th Cir. 1974) . . . . . 11

*Canty v. City of Richmond, Va. Police Dept.*, 383 F.Supp. 1396(E.D.Va. 1974), *affirmed*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 423 U.S. 1062, 96 S.Ct. 802, 46 L.Ed.2d 654 (1976) . . . . . 11

*Conley v. Gibson*, 355 U.S. 41, 45-46 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957) . . . . . 11

*Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2nd Cir. 1991) . . . . . 15

*Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976) . . . . . 11

*Fachee v. Daoust Const. Co.*, 185 F.2d 23 (7th Cir. 1950) . . . . . 15

*Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462 (4th Cir. 1991) . . . . . 14

*Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972) . . . . . 11

*Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991) . . . . . 15

*Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers*, 193 F.2d 209 (6th Cir. 1951, *cert. denied*, 72 S.Ct. 1060, 343 U.S. 966, 96 L.Ed. 1363 . . . . . 14

*Hernandez v. Coughlin*, 18 F.3d 133, 136 (2nd Cir.), *cert. denied*, 115 S.Ct. 117, 130 L.Ed.2d 63 (1994) . . . . . 11

*Hoff Supply Co. v. Allen-Bradley Co.*, 768 F.Supp. 132, 134 (M.D.Pa. 1991) . . . . . 15

*Holiday v. Johnston*, 313 U.S. 342, 350, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941) . . . . . 12

*Hughes v. Rowe*, 101 S.Ct.173, 449 U.S. 5, 66 L.Ed.2d 163 (1980)
. . . . . 11

*Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621 (9th Cir. 1988)
. . . . . 14

*Kolbeck v. LIT Am., Inc.*, 923 F.Supp. 557, 560 (S.D.N.Y. 1996)
. . . . . 15

*Neville v. American Republic Ins. Co.*, 912 F.2d 813, 814, (5th Cir. 1990)
. . . . . 15

*Optical Alignment Sys. & Inspection Servs., Inc. v. Alignment Servs., Inc.*, 909 F.Supp. 58 (D.N.H. 1995)
. . . . . 15

*Park-In Theatres v. Paramount-Richards Theatres, DC*, 185 F.2d 407 (3rd Cir. 1950), *cert. denied*, 71 S.Ct. 1017, 341 U.S. 1950, 95 L.Ed. 1373
. . . . . 15

*Rice v. Olson*, 324 U.S. 786, 791-92, 65 S.Ct. 989, 89 L.Ed. 1367 (1945)
. . . . . 12

*Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)
. . . . . 11

*Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969) . . . . . 15

*Simons v. Montgomery County Police Officers*, 762 F.2d 30 (4th Cir. 1985) . . . . . 14

*Sinclair Refining Co. v. Stevens*, 123 F.2d 186 (8th Cir. 1941), *cert.denied*, 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed 1203 . . . . . 14

*Solis-Ramirez on behalf of Solis v. U. S. Dept. of Justice*, 758 F.2d 1426 (11th Cir. 1985) . . . . . 15

*Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429 (7th Cir. 1993) . . . . . 15

**Statutes Cited:**

Civil Rights Act of 1866, 42 U.S.C. § 1981 . . . . . *passim*

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* . . . . . *passim*

28 U.S.C. § 1254(1) . . . . . 1

**Rules Cited:**

Federal Rule of Civil Procedure 8(f), 28 U.S.C. . . . . *passim*

Federal Rule of Civil Procedure 10(c), 28 U.S.C.
. . . . . *passim*

Federal Rule of Civil Procedure 12(b)(6), 28 U.S.C.
. . . . . *passim*

Federal Rule of Civil Procedure 15, 28 U.S.C.
. . . . . *passim*

Federal Rule of Civil Procedure 56, 28 U.S.C.
. . . . . *passim*

**Other Authority Cited:**

Moore's Federal Practice 3D, § 10.05[1]
. . . . . 13

**TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:**

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Petitioner Michael A. Scott ("Scott"), as *pro se*, respectfully requests that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is provided in Appendix A. The opinion and order of the district court regarding the petitioner's claim under the Civil Rights Act of 1866, 42 U.S.C. § 1981 is provided in Appendix C. The opinion and order of the district court denying the petitioner to claim his job transfer, harassment and employment termination as racially motivated and as acts of retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is provided in Appendix D.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on June 24, 1998 (App. A). The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing in banc on August 10, 1998 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides, in pertinent part, the following:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Civil Rights Act of 1866, 42 U.S.C. § 1981 provides, in pertinent part, the following:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Federal Rule of Civil Procedure, 28 U.S.C., Rule 8(f) provides:

> All pleadings shall be so construed as to do substantial justice.

Federal Rule of Civil Procedure, 28 U.S.C., Rule 10(c) provides, in pertinent part, the following:

> A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

## STATEMENT OF THE CASE

The fundamental question in this case is whether litigants are entitled to have the exhibits appended to their pleadings and the contents therein considered and construed by the district court in deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and a motion for summary judgment under Federal Rule of Civil Procedure 56. To fully appreciate the significance of the issues presented by this case, it is essential to consider its procedural background.

### A. Background Of The District Court's Dismissal Of Petitioner's § 1981 Claim.

On March 11, 1996, Scott filed a 32 count *pro se* complaint against his former employer Norfolk Southern Corporation ("NS"), and 14 individual executives, managers and supervisors of NS (collectively referred to hereinafter as "Individual Defendants"). Scott claimed that he had been harassed, transferred and discharged because of his black race and as acts of retaliation against him for having previously filed a charge of discrimination against NS with the Federal Equal Employment Opportunity Commission ("EEOC") and a subsequent lawsuit in the United States District Court for the Eastern District of Virginia against NS

based on that charge. The district court permitted Scott to amend his complaint three times; a fourth motion to amend was denied on June 6, 1996. NS and the Individual Defendants moved to dismiss the third amended complaint under Federal Rule of Civil Procedure 12(b)(6) on May 7, 1996. In August 1996, the district court dismissed twenty-four (24) of the thirty-two (32) counts alleged in the third amended complaint against NS, including the § 1981 claim, and dismissed all claims against the Individual Defendants. The district court granted Scott leave to re-plead the eight (8) remaining counts against NS which included his claim under Title VII for retaliation and racial discrimination. Thereafter, Scott filed a motion for reconsideration with the district court asking it to reinstate his § 1981 claim. The district court denied that motion. Discovery was stayed in the case until after the district court ruled on the defendants' motion to dismiss, which occurred on August 5, 1996.

On August 16, 1996, Scott filed his fifth amended complaint pursuant to the district court's order at the August 5, 1996 hearing, which NS answered on September 3, 1996. The eight counts included in the fifth amended complaint were: (1) Title VII racial discrimination and retaliation; (2) personal injury under the Federal Employers' Liability Act ("FELA"); (3) assault and battery; (4) wrongful discharge under Virginia law; (5) intentional infliction of emotional distress under the FELA; (6) negligent infliction of emotional distress under the FELA; (7) intentional infliction of emotional distress under Virginia law; and (8) negligent infliction of emotional distress under Virginia law.

Appended as exhibits to both the third and fifth amended complaint was Scott's charge of discrimination (App. E) and supporting affidavit (App. F) he filed with the EEOC against NS in March 1996 which gave rise to the case at bar. In the EEOC charge of discrimination, Scott alleged, in part, the following:

> 1. I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a

charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.

3. I believe I was harassed, transferred, and discharged because of my race, Black, and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights Act of 1964, as amended.

(App. E). In the EEOC affidavit, Scott alleged, in part, the following:

Last summer, W. F. Henley, a White General Foreman, made threats of violence/bodily harm and death against me because I filed the charge. He was one of the persons I accused concerning sexual harassment.

J. R. Gray, a White Assistant Master Mechanic; D. D. Graab, a White Master Mechanic; J. W. Clemmer, a White General Foreman; and J. E. Pair, a White Engineer harassed me by making accusations that I was not participating with other supervisors, not being a team player with other White supervisors, and not regularly attending safety meetings.

> J. W. Clemmer stated I was an incompetent Black Engineer.
>
> I was given more and bigger projects than J. E. Pair, J. A. Scott, and J. W. Clemmer to be completed in the same length of time. J. R. Gray gave these assignments through J. E. Pair.
>
> I was followed by private investigators hired by the Respondent. I was able to obtain the evidence to establish I was being followed. I was discharged after I took a letter to J. R. Gray which complained about being followed by the private investigators.

(App. F). Scott's third amended complaint (¶¶ 66, 68-70) clearly established "April 1994", "January 1995" and "Summer 1995" as the dates from which the harassment, and ultimately the transfer and discharge, he alleged in the third amended complaint began and made numerous specific allegations of racial discrimination which had occurred since those dates. Indeed, Scott made several specific allegations of racial harassment, transfer and discharge enumerated in his third amended complaint (¶¶ 69-78, 90-93, 103-106) which supported, echoed and further explicated the allegations he made in his EEOC charge of discrimination and its supporting affidavit appended as exhibits to the third amended complaint. Scott alleged in ¶¶ 69-78 of the third amended complaint that the specific racially harassing conduct was made "in reaction to" and or "after" he filed the January 1995 EEOC charge of discrimination against NS. The instant case was filed in March 1996 and, therefore, any of his allegations cognizable under § 1981 were timely.

Significantly, the district court, in dismissing Scott's § 1981 claim against all defendants, stated, in part, the following:

> [T]he statute of Limitation under 42 U.S.C. § 1981 is two years . . . Scott's EEOC charge and subsequent Title VII lawsuit alleged male-on-male sexual harassment. Scott has not alleged that he was the victim of racial discrimination within the two year Statute of Limitation.

(App. C at 4). Scott filed his initial *pro se* complaint in the underlying action on March 11, 1996. Therefore, Scott's § 1981 claim should have encompassed racially discriminatory conduct that was alleged to have occurred since March 11, 1994. In apparent direct contrast in its decision granting Scott leave to amend his Title VII racial discrimination and retaliation claim, the district court stated, in part, the following:

> As to Scott's claims against Norfolk Southern, Defendants contend that Scott's allegations relate to events which occurred before the 300 day deadline preceding the EEOC filing, and are thus barred under 42 U.S.C. § 2000e-5(e). **Scott's makes several allegations in the EEOC charge and in his Complaint that are not dated** so the Court cannot determine in what time period these events happened.

*Id.* at 3 (emphasis added). Interestingly, the district court apparently considered the allegations Scott made in the EEOC charge in deciding to grant him leave to amend his Title VII claim for racial discrimination and retaliation, but apparently failed to do so in dismissing Scott's § 1981 claim and in refusing to allow him to claim that the harassment, job transfer and discharge were racially motivated and acts of retaliation under Title VII.

**B. Background Of The District Court's Refusal To Allow The Petitioner To Claim That The Harassment, Job Transfer And Discharge Were Racially Motivated And Acts Of Retaliation Under Title VII Of The Civil Rights Act Of 1964.**

On December 16, 1996, NS filed motions to dismiss and for summary judgment, filing in support of the motions Scott's deposition, exhibits, and affidavits of Respondents Jerry R. Gray, Jeff E. Pair, and Timothy A. Heilig, and NS Police Director, Steven G. Hanes. Scott filed a brief in opposition, exhibits and his own affidavit. Following the briefing, a hearing was held on January 28, 1997 during which the district court granted summary judgment for NS on Scott's Title VII equal compensation and promotion claims, and on the intentional infliction of emotional distress counts under both Virginia law and the FELA. The district court denied NS's motions with respect to the remaining claims.

Scott argued to the district court that he was contending his job transfer, on-the-job harassment and employment termination were due to his black race and were acts of retaliation for having previously filed a charge of discrimination with the EEOC against NS. However, the district court articulated that while Scott was then apparently contending that his transfer, harassment and discharge were both retaliatory and racially motivated, the specific theories pleaded in the fifth amended complaint were racial discharge and retaliatory transfer, and not retaliatory discharge or racial transfer and, therefore, limited his claims to his fifth amended complaint allegations. (Hearing, Tr. 1/28/97 at 37). In its opinion and order, the district court stated:

> In Scott's brief in opposition to the defendant's motion for summary judgment, and at the January 28, 1997 hearing, Scott also argued that his termination was in retaliation for filing charges with the EEOC and related lawsuits, and

> that his transfer was racially motivated. This Court has granted Scott numerous opportunities to amend his complaint. Nevertheless, Scott has never made such allegations in any of his amended complaints. Accordingly, the Court will not allow him to advance these new theories at this late stage of the proceedings.

(App. D at 8, n. 2).

Subsequently, NS renewed its motion to dismiss the Title VII retaliatory transfer claim in Count I of the fifth amended complaint at the February 14, 1997 motion in Limine hearing. The district court granted the motion and dismissed the retaliatory transfer claim at that time. A jury was selected on February 18, 1997 and trial was continued until March 24, 1997. Following the jury deliberations on the seventh and eighth day of trial, the jury returned a verdict in favor of NS with respect to Scott's Title VII racial harassment and racial discharge claims, the wrongful discharge claim under Virginia law, and the assault and battery claims. The jury returned a verdict against NS and in favor of Scott on the FELA injury claim. During the trial, the district court did not allow Scott to present any evidence of promotion denials and disparate pay (both cognizable under the dismissed § 1981 claim) because it had previously granted NS summary judgment on those Title VII claims. Transcripts of the district court's hearings on the Respondents' motion to dismiss the third amended complaint (August 5, 1996), and NS's motions to dismiss and for summary judgment on the fifth amended complaint (January 28, 1997) are a part of the record in this case.

Scott noted an appeal on April 10, 1997 against NS and the Individual Defendants, which included an appeal of the district court's dismissal of his Title VII retaliation claim (and its refusal to allow Scott to claim both racial and retaliatory harassment, transfer and discharge) against NS and dismissal of his § 1981 claim

against all Respondents. The Court of Appeals vacated and remanded Scott's Title VII retaliatory transfer claim against NS to the district court, but affirmed, without opinion, the remainder of the district court's rulings appealed by Scott (App. A).

Taken together, the import of the Court of Appeals and the district court's ruling is clear. In refusing to consider and construe Scott's EEOC charge of discrimination and its supporting affidavit securely appended to and referenced in both the third and fifth amended complaint, the opinions below imply that a litigant who attaches to his complaint documents which contain specific allegations that are fountainhead of his complaints has no right to rely on those documents and their allegations as part of his complaint to support his legal claims, and also ignores or trivializes the important role of the Federal Rules of Civil Procedure, Rules 8(f) and 10(c), in construing pleadings.

## REASONS FOR GRANTING THE WRIT

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON CONSTRUING PLEADINGS OF LITIGANTS PROCEEDING WITHOUT THE AID OF PROFESSIONAL COUNSEL.

Scott's petition for *writ of certiorari* should be granted because the opinion below conflicts with this Court's important settled precedents with regard to the standards under Federal Rule of Civil Procedure 12(b)(6) courts should apply when construing the complaint of a litigant who is proceeding without the aid of counsel. In delineating the contours of these standards, this Court has consistently held that it is settled law that allegations such as those presented by Scott in his third and fifth amended complaint, "however inartfully pleaded" are held "to less stringent standards

than formal pleadings drafted by lawyers . . ." *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972); *Hughes v. Rowe*, 101 S.Ct.173 (1980), 449 U.S. 5, 66 L.Ed.2d 163. This Court reaffirmed the principles of *Haines* in *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976): "As the Court unanimously held in *Haines v. Kerner*, 404 U.S. 519 [92 S.Ct. 594, 30 L.Ed.2d 652] (1972), a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Id.*, at 520, 521 [92 S.Ct., at 595-596] quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 [78 S.Ct. 99, 101-102, 2 L.Ed.2d 80] (1957)." The issue is not whether Scott was likely to ultimately prevail on his § 1981 claim, "but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The Court of Appeals and other lower courts have appropriately applied with special care these standards with regard to *pro se* complainants pleading civil rights claims in that "district courts must be especially solicitous of civil rights plaintiffs." *Canty v. City of Richmond, Va. Police Dept.*, 383 F.Supp. 1396 (E.D.Va. 1974), *affirmed*, 526 F.2d 587 (4th Cir. 1975), *cert. denied.*, 423 U.S. 1062, 96 S.Ct. 802, 46 L.Ed.2d 654 (1976); *Burns v. State Department of Public Welfare of S. C.*, 491 F.2d 762 (4th Cir. 1974); *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2nd Cir.), *cert. denied*, 115 S.Ct. 117, 130 L.Ed.2d 63 (1994); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990).

Scott concedes that the district court did allow him to amend his complaint four times. However, Scott takes exception to the district court's finding that there was no set of facts provable by him in the third amended complaint for his § 1981 claim against all defendants. Indeed, the district court allowed Scott to amend his Title VII claim against NS which also included allegations of racial

discrimination. Ironically, the time limitations for a Title VII action was 300 days as compared to 2 years for a § 1981 claim. *See* App. C at 3, 4. It is now established doctrine that pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated, and even if the claim is insufficient in substance, it may be amended to achieve justice. *Rice v. Olson,* 324 U.S. 786, 791-92, 65 S.Ct. 989, 89 L.Ed. 1367 (1945); *Holiday v. Johnston,* 313 U.S. 342, 350, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941). Despite the number of times the district court allowed Scott to amend his complaint, it should have given him the benefit of a liberally construed complaint (with its attached exhibits) in the spirit embodied in Federal Rules of Civil Procedure 8(f), 10(c) and 15. *Beacon Theatres, Inc. v. Westover,* 79 S.Ct. 948, 359 U.S. 500, 3 L.Ed.2d 988 (1958).

Scott's petition should be granted so that this Court may affirm the importance of its long standing holdings on construing complaints for litigants invoking the federal judicial machinery without professional counsel for resolution of their complaints, and so that it may confirm for the first time the applicability of the unambiguous language of Federal Rule of Civil Procedure 10(c) to written documents attached to a pleading and how such documents and their contents should be construed with the pleading.

II.

**THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 10(c) AND THE OPINION OF OTHER FEDERAL COURTS OF APPEALS.**

Scott's petition for *writ of certiorari* should be granted because the opinion below conflicts with the unambiguous language of Federal Rule of Civil Procedure 10(c) and the opinion of other federal courts of appeals that have construed pleadings with exhibits attached under Rule 10(c).

As stated in section B above, the district court concluded that Scott had "never" made allegations in any of his amended complaints that the harassment, job transfer and discharge were racially motivated and acts of retaliation for having previously filed an EEOC charge. That conclusion was clearly erroneous. Scott appended to his fifth amended complaint the EEOC charge of discrimination and supporting affidavit he filed with the EEOC in March 1996 as exhibits and made reference to them in the fifth amended complaint (App. E & F). Both the EEOC charge of discrimination and affidavit made a specific allegation that Scott was harassed, transferred and discharged because of his black race and as an act of retaliation for having previously filed an EEOC charge against NS.

Federal Rule of Civil Procedure 10(c) provides, in pertinent part, the following: "A copy of any [written instrument] which is **an exhibit to a pleading is a part thereof for all purposes.**" (emphasis added). Moreover, "[t]he **contents** of the written instrument **will be considered in determining the party's claim for relief** or defense or for any motion for relief." *Moore's Federal Practice 3D*, § 10.05[1] (emphasis added). The issue is not how many times the district court allowed Scott to amend his complaint, but rather how the district court actually construed the operative complaint in deciding the defendant's dispositive motions. Scott's EEOC charge of discrimination and affidavit securely attached as exhibits to his third and fifth amended complaint and referred to in the complaints were the inception from which his Title VII and § 1981 claims grew and it was clear from a review of the third and fifth amended complaint that those allegations alleged therein and in the EEOC charge of discrimination and affidavit were the germane issues before the district court and set the context of Scott's complaints and concerns. Casting the circumstances of this case in this light, the defendants had sufficient notice of Scott's complaints, allegations and real concerns. "Where the context, as here, makes clear a litigant's essential grievance, the complainant's additional invocation of general legal principles need not detour the district

court from resolving that which the litigant himself has shown to be his real concern." *Beaudett v. City of Hampton*, 775 F.2d 1274 (4th Cir. 1985).

The district court's denial of Scott to claim the harassment, job transfer and discharge as both racially motivated and retaliatory flies-in-the-face of the liberal standards adopted by the courts in construing pleadings, especially *pro se* pleadings in civil rights litigation. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621 (9th Cir. 1988). Despite the number of times Scott was allowed to amend his complaint, he consistently appended the EEOC charge of discrimination and affidavit as exhibits to each amended complaint because of the specific allegations contained in them. The district court presumably recognized its responsibility to construe the complaint exhibits under Rule 10(c) in deciding dispositive motions, but failed to apply that standard to Scott's exhibits securely attached to his third and fifth amended complaint (App. C at 2).

In denying Scott to claim the harassment, job transfer and discharge as both racially motivated and retaliatory conduct, the district court either failed to apply or ignored the important requirements in Federal Rule of Civil Procedure 10(c) that "any [written instrument] which is **an exhibit to a pleading is a part thereof for all purposes.**" Fed. R. Civ. P. 10(c) (emphasis added). The district court's ruling, and the Court of Appeals affirming that ruling, articulated above regarding Scott's Title VII claim trivializes the effect of Rule 10(c) and conflicts with the opinion and approach of other courts of appeals, **including the Fourth Circuit**, to the application of Fed. R. Civ. P. 10(c) to exhibits attached to pleadings. See *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462 (4th Cir. 1991) (exhibits to complaint considered in deciding motion to dismiss); *Simons v. Montgomery County Police Officers*, 762 F.2d 30 (4th Cir. 1985); *Sinclair Refining Co. v. Stevens*, 123 F.2d 186 (8th Cir. 1941), *cert. denied*, 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1203; *Hamilton Foundry & Machine Co. v. International*

*Molders & Foundry Workers*, 193 F.2d 209 (6th Cir. 1951), *cert. denied*, 72 S.Ct. 1060, 343 U.S. 966, 96 L.Ed. 1363; *Park-In Theatres v. Paramount-Richards Theatres, DC*, 185 F.2d 407 (3rd Cir. 1950), *cert. denied*, 71 S.Ct. 1017, 341 U.S. 1950, 95 L.Ed.1373; *Solis-Ramirez on Behalf of Solis v. U.S. Department of Justice*, 758 F.2d 1426 (11th Cir. 1985); *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991) (written document deemed attached to complaint and incorporated as exhibit therein considered in subsequent motion to dismiss complaint); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2nd Cir. 1991) (we have held that the complaint is deemed to include any written instrument attached to it as an exhibit); *Hoff Supply Co. v. Allen-Bradley Co.*, 768 F.Supp. 132, 134 n.3 (M.D.Pa. 1991) (distributor agreements incorporated as exhibits to complaint considered in ruling on summary judgment motion); *Optical Alignment Sys. & Inspection Servs., Inc. v. Alignment Servs., Inc.*, 909 F.Supp. 58, 60 (D.N.H. 1995) (in ruling on motion to dismiss, court can consider documents attached to complaint or expressly incorporated by reference); *Kolbeck v. LIT Am., Inc.*, 923 F.Supp. 557, 560 (S.D.N.Y. 1996) (citing **Moore's,** court considered exhibits mentioned in and attached to pleadings in deciding motion to dismiss); *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Neville v. American Republic Ins. Co.*, 912 F.2d 813, 814, n.1 (5th Cir. 1990); *Fachee v. Daoust Const. Co.*, 185 F.2d 23 (7th Cir. 1950); *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969).

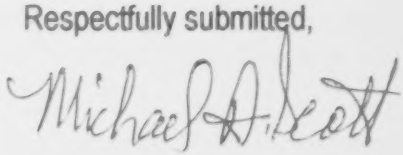
## CONCLUSION

This case presents a question of exceptional importance -- whether a litigant is entitled to have the written exhibits and their contents appended to a pleading construed as part of the pleading in opposing a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and a motion for summary judgment under Fed. R. Civ. P. 56. If the opinion below is allowed to stand, the Court of Appeals and district court's approach to construing Scott's third and fifth amended

complaints will have thwarted the liberal approach of the Federal Rules of Civil Procedure to pleading and, therefore, held Scott's *pro se* complaints to standards not envisioned by this Court. By granting Scott's *petition for certiorari,* however, this Court can correct the Fourth Circuit's decision, which defies this Court's long standing holdings that a claimant proceeding without the aid of counsel should have his pleadings held to "less stringent standards" than those "drafted by lawyers"; can correct the erroneous fact-finding of the district court regarding Scott's § 1981 claim against all defendants; and can correct the Court of Appeals and district court's erroneous application of Fed. R. Civ. P. 10(c) to the manner in which they construed Scott's third and fifth amended complaints.

Accordingly, the petitioner, Michael A. Scott, respectfully requests that his petition for *writ of certiorari* be granted.

Respectfully submitted,



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